

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 15, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEREMY JOHNSON,

Plaintiff,

v.

HYOK PARK, individually;
SUNGHEE PARK, individually; and
BONG WOOK PARK, individually,

Defendants.

NO: 4:21-CV-5036-RMP

ORDER DENYING WITH LEAVE
TO RENEW PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT

BEFORE THE COURT is Plaintiff Jeremy Johnson's Motion for Default Judgment. ECF No. 15. Plaintiff moves for default judgment against Defendant Bong Wook Park. *See id.* The Court has considered the motion and supporting brief, the remaining record, the relevant case law, and is fully informed.

BACKGROUND

On March 12, 2021, Johnson filed a Complaint for declaratory and injunctive relief under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, et seq. and the Washington Law Against Discrimination

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DEFAULT JUDGMENT ~ 1

1 (“WLAD”), Revised Code of Washington (“RCW”) 49.60.030(1). ECF No. 1 at 3,
2 11. Johnson, who asserts that he must use a wheelchair on account of his
3 disability, alleges that he attempted to visit a business called Kwick Stop on Swift
4 Boulevard in Richland, Washington (the alleged “subject public accommodation”),
5 and that he was unable to fully and equally access and enjoy the facilities, services,
6 goods, privileges, and accommodations offered by the business due to several
7 architectural barriers. *Id.* at 2–3. Johnson alleges that the real property where
8 Kwick Stop is located is leased or owned by Defendants Bong Wook Park, Hyok
9 Park, and Sunghee Park, and that Bong Wook Park¹ is a “sole proprietor.” *Id.* at
10 2–3.

11 According to the Proof of Service filed by Johnson, a process server
12 personally served Bong Wook Park with the Summons and Complaint on March
13 23, 2021. ECF No. 3. Bong Wook Park failed to answer Johnson’s Complaint, or
14 otherwise defend this action. *See* ECF No. No. 16 at 2-3. Johnson moved for
15 entry of default against Bong Wook Park on May 5, 2021, and the Clerk of Court
16 entered an Order of Default as requested. ECF Nos. 7 and 8.

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20 ¹ As all Defendants in this action share the surname “Park,” the Court uses
21 Defendants’ full names throughout this Order, to avoid confusion.

1 ***Relief Sought***

2 Johnson now moves for default judgment against Bong Wook Park, asking
 3 the Court to: (1) declare that the subject public accommodation violates Title III of
 4 the ADA and also violates the WLAD; (2) order the Defendants to alter their
 5 premises and amenities to make them accessible to and usable by individuals with
 6 disabilities to the full extent required by Title III of the Americans with Disabilities
 7 Act; (3) order all portions of the Defendants' premises identified in the Complaint
 8 as being non-compliant to be enjoined from being open to the public until such
 9 time that Defendants can prove to the Court that the entire facility is fully
 10 compliant; (4) award reasonable attorney's fees and costs and any other expenses
 11 related to the suit to Plaintiff. ECF No. 16 at 2–3.

12 **LEGAL STANDARD**

13 After the Clerk of Court enters an order of default, a plaintiff may seek entry
 14 of a default judgment from the Court. Fed. R. Civ. P. 55(b); LCivR 55(b)(1).
 15 “The general rule of law is that upon default the factual allegations of the
 16 complaint, except those relating to the amount of damages, will be taken as true.”
 17 *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). A
 18 plaintiff moving for default judgment must provide evidence of all damages sought
 19 in the Complaint, and the damages sought must not be different in kind or exceed
 20 the amount demanded in the pleadings. *See TeleVideo Sys.*, 826 F.3d at 917–18.

1 Plaintiffs in this District also must file an affidavit or declaration specifying
2 “whether the party against whom judgment is sought is an infant or an incompetent
3 person and, if so, whether that person is represented by a general guardian,
4 conservator, or other like fiduciary; and must “attest that the Servicemembers Civil
5 Relief Act, 50 U.S.C. §§ 501-597b does not apply.” LCivR 55(b)(1).²

6 “Even if entry of default has been made by the court clerk, granting a default
7 judgment is not automatic; rather it is left to the sound discretion of the court.”
8 *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999) (citing *Aldabe*
9 *v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)). Rule 55 also “gives the court
10 considerable leeway as to what it may require as a prerequisite to the entry of a
11 default judgment.” *TeleVideo Sys.*, 826 F.2d at 917.

12 The Ninth Circuit has prescribed the following factors to guide the Court’s
13 decision regarding the entry of a default judgment: “(1) the possibility of prejudice
14 to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of
15 the complaint, (4) the sum of money at stake in the action, (5) the possibility of a
16 dispute concerning material facts, (6) whether the default was due to excusable
17 neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure
18
19

20 ² The Court finds no such affidavit nor declaration submitted with Plaintiff’s
21 Motion for Default Judgment.

1 favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471– 72 (9th
2 Cir. 1986).

3 DISCUSSION

4 As a preliminary matter, the Court notes that the Proof of Service filed by
5 Plaintiff supports that Defendant Bong Wook Park received adequate service of
6 process, through personal service on March 23, 2021. ECF No. 3; Fed. R. Civ. P.
7 4(e)(2)(A) (providing for personal service); RCW 4.28.080(16) (same). In
8 addition, the Court has subject matter jurisdiction over this matter, as Plaintiff’s
9 ADA claim presents a federal question. *See* 28 U.S.C. § 1331.

10 *Eitel Factors*

11 Possibility of Prejudice

12 Defendant Bong Wook Park has failed to appear or file an answer to the
13 complaint. *See* ECF No. 16 at 2–3. Johnson appears to lack an alternative to
14 default judgment to ensure that Johnson can use Kwick Stop in the future.
15 However, the Court also notes that Plaintiff’s allegations of future use are minimal
16 and conclusory, alleging only that Plaintiff “lives in Benton County, Washington
17 [sic] and travels in the surrounding areas near Defendants’ facilities on a regular
18 basis for shopping, dining and entertainment.” ECF No. 1 at 2. Therefore, the first
19 *Eitel* factor favors Plaintiff, but not heavily.

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1 Substantive Merits and Sufficiency of the Complaint

2 The second and third *Eitel* factors are assessed by analyzing whether the
3 allegations in the Complaint are sufficient to state a claim on which Plaintiff may
4 recover. *See Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Plaintiff
5 claims that Defendant Bong Wook Park violated his rights under Title III of the
6 ADA and the WLAD, by reference to the ADA. ECF. No. 1 at 3–13.

7 “To prevail on a Title III discrimination claim, the plaintiff must show that
8 (1) [he] is disabled within the meaning of the ADA; (2) the defendant is a private
9 entity that owns, leases, or operates a place of public accommodation; and (3) the
10 plaintiff was denied public accommodations because of [his] disability.” *Molski v.*
11 *MJ. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (citing 42 U.S.C. §§ 12182(a)-
12 (b)). Discrimination on account of disability under the ADA includes “a failure to
13 remove architectural barriers, . . . in existing facilities, . . . where such removal is
14 readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). Furthermore, to state a
15 sufficient claim for discrimination under the ADA because of “the presence of
16 architectural barriers in an existing facility, a plaintiff must allege and prove that:
17 ‘(1) the existing facility at the defendant’s place of business presents an
18 architectural barrier prohibited under the ADA, and (2) the removal of the barrier
19 is readily achievable.’” *Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134, 1138
20 (S.D. Cal. 2006) (quoting *Parr v. L & L Drive-Inn Rest.*, 96 F.Supp.2d 1065, 1085
21 (D. Haw. 2000)).

1 Plaintiff alleges that he is a quadriplegic who requires a wheelchair and is
2 substantially limited in performing one or more major life activities, including
3 walking, standing, and maneuvering. ECF No. 1 at 2. The ADA's definition of
4 disability includes substantial limitations to walking. *See* 42 U.S.C. § 12102.
5 Accepting Plaintiff's allegations as true for purposes of this motion, Plaintiff has
6 established an ADA disability.

7 Plaintiff also alleges that Kwick Stop is a public accommodation under the
8 ADA "in that they are establishments [sic] which provide goods and services to the
9 public." ECF No. 1 at 3. Plaintiff alleges that each Defendant either owns, leases,
10 or operates the public accommodation. *Id.* at 2-3. The ADA defines a public
11 accommodation to include an establishment that serves food or drink; a grocery
12 store or other sales or rental establishments; and a gas station or other service
13 establishment. *See* 42 U.S.C. § 12181(7). Accepting as true the bare allegations of
14 the Complaint, Kwick Stop satisfies the ADA's definition of a public
15 accommodation.

16 Next, Plaintiff must demonstrate that he was denied public accommodations
17 by Defendant Bong Wook Park due to Plaintiff's disability. *Molski*, 481 F.3d at
18 730. Under the ADA, the Attorney General is responsible for promulgating the
19 implementing regulations for Title III. *Fortyune v. Am. Multi-Cinema, Inc.*, 364
20 F.3d 1075, 1080 (9th Cir. 2004) (citing 42 U.S.C. § 12186(b)). Congress required
21 these implementing regulations to be consistent with the minimum guidelines

1 issued by the Architectural and Transportation Barriers Compliance Board, which
2 issued its ADA Accessibility Guidelines for Buildings and Facilities (“ADAAG”)
3 in 1991. *Fortune*, 364 F.3d at 1080 (citing 42 U.S.C. § 12186(c); 36 C.F.R. Pt.
4 1191, App. A).

5 The Ninth Circuit has held that the ADAAG inform whether a facility meets
6 the accessibility under the ADA. *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d
7 939, 945 (9th Cir. 2011) (citations omitted). “The overall policy of the ADA is to
8 require relatively few changes to existing buildings, but to impose extensive design
9 requirements when buildings are modified or replaced.” *Twede v. Univ. of*
10 *Washington*, 309 F. Supp. 3d 886, 900 (W.D. Wash. 2018). Toward that end, Title
11 III sets forth three categories of accessibility requirements, to which corresponding
12 ADAAG apply: the “new construction” provisions, which apply to public
13 accommodations constructed after January 26, 1992; the “alteration” provisions,
14 which apply to post-January 26, 1992 alterations to buildings that existed as of that
15 date; and the “readily achievable” provisions, which apply to unaltered portions of
16 buildings constructed before January 26, 1992. 28 C.F.R. §§ 36.401, 36.402; *see*
17 *also Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 847 (N.D. Cal. 2011).

18 A facility that existed when the ADA was enacted only must remove
19 “architectural barriers” where doing so is “readily achievable.” See 42 U.S.C. §
20 12182(b)(2)(A)(iv). However, the ADA requires that any alterations made after
21 January 26, 1992, to an existing building be made “readily accessible to and

1 useable by” individuals with disabilities “to the maximum extent feasible[.]” 42
2 U.S.C. § 12183(a)(2). An entity must comply with the ADAAG in effect at the
3 time of alteration. *See* 28 C.F.R. § 36 App. A (providing that an existing “facility
4 is subject to the alterations requirements and standards in effect at the time of the
5 alteration”).

6 With respect to when Kwick Stop was constructed or altered, Plaintiff
7 alleges only: “The Plaintiff is informed and believes, and therefore alleges, that the
8 Subject Facility has begun operations and/or undergone remodeling, repairs and/or
9 alterations since January 26, 1990 and more specifically on or after March 15,
10 2012 as it pertains to 28 C.F.R. § 36.406.” ECF No. 1 at 3. Plaintiff provides no
11 further information with his Motion for Default Judgment with respect to when the
12 Quick Stop was built or altered.

13 Nevertheless, Plaintiff alleges the following as barriers that he encountered
14 during his visit to Kwick Stop on or about October 26, 2020, and that allegedly are
15 non-compliant with the ADA:

- 16 1. cross slope grading and slip-resistant surfaces. Specifically, the slip-
17 resistant access aisle ground surfaces and wheelchair accessible cross
18 slope grading exceeded 2%;
- 19 2. parking stall, access aisle striping, and markings, which are
20 dilapidated and in need of repairs;
- 21 3. parking stall and access aisle sizes;
4. parking stall signage;

5. access aisle width clearance;
6. accessible route from accessible parking spaces to the accessible building entrance;
7. accessible route that does not provide abrupt changes in elevation greater than 1/4 inch;
8. accessible route with compliant slope grading;
9. entrance door hardware;
10. door maneuvering clearances;
11. carpet or carpet tile;
12. service counters;
13. accessible self-serve counter height;
14. accessible self-serve dispenser reach ranges;
15. interior aisle width clearances;
16. accessible merchandise reach range;
17. point of sale, merchandise, and display reach range, throughout the subject facility;
18. restroom signage; and
19. restroom facilities, including, but not limited to, compliant restroom door, signage, hardware, the required restroom maneuverability clear floor space, toilet and lavatory clear floor spaces, entry door clear floor space, accessible grab bars, accessible dispenser heights, and mirror height.

ECF No. 1 at 5–10.

Without a factual basis to determine which accessibility standards applied to the Kwick Stop premises based on when the premises were constructed and when or whether the premises have been altered, the Court cannot determine whether

1 Plaintiff has established an architectural barrier prohibited under the ADA. *See*
2 *Hubbard*, 433 F.Supp.2d at 1138 (noting that a plaintiff alleging discrimination on
3 account of disability due to an architectural barrier must prove that the existing
4 state of the defendant's premises violates the ADA).

5 Likewise, Plaintiff alleges summarily that the removal of the alleged
6 architectural barriers is readily achievable. ECF No. 1 at 4, 11. The ADA defines
7 "readily achievable" as "easily accomplishable and able to be carried out without
8 much difficulty or expense." 42 U.S.C. § 12181. The Ninth Circuit has held that
9 an ADA plaintiff bears "the initial burden at summary judgment of *plausibly*
10 *showing* that the cost of removing an architectural barrier does not exceed the
11 benefits under the particular circumstances." *Lopez v. Catalina Channel Express,*
12 *Inc.*, 974 F.3d 1030, 1034–35 (9th Cir. 2020) (emphasis in original); *see also Jones*
13 *v. Islam*, No. 2:20-cv-11038-JLS-JPR, 2021 U.S. Dist. LEXIS 150450, at *17
14 (C.D. Cal. July 7, 2021) (finding that district courts in the Ninth Circuit apply the
15 same burden where plaintiff seeks default judgment).

16 Plaintiff's conclusory, non-specific, and unsupported allegations are
17 insufficient to support that removal of any barriers is readily achievable by
18 Defendant Bong Wook Park. *See* ECF No. 1 at 4, 11; *Soto v. Doublz of El Monte,*
19 *Inc.*, No. CV 20-10296 FMO (SKx), 2021 U.S. Dist. LEXIS 160007 * at 4-5 (C.D.
20 Cal. Aug. 23, 2021) (finding "plaintiff's conclusory allegations that defendant
21 'ha[s] the financial resources to remove these barriers without much difficulty or

1 expense[,]” insufficient). Plaintiff seeks the severe remedy of enjoining
2 Defendant from opening any portion of the Kwick Stop to the public until
3 Defendant demonstrates that the entire premises are fully compliant with the ADA.
4 ECF No. 16 at 3. However, Plaintiff does not meet his own burden of proving or
5 even alleging with any specificity that removal of any barriers is readily
6 achievable. Accordingly, the Court finds that the second and third *Eitel* factors do
7 not support default judgment as to Plaintiff’s ADA claim.

8 Sum of Money at Stake

9 The fourth *Eitel* factor is the sum of money at stake in the action. *Eitel*, 782
10 F.2d at 1471–72. In addition to injunctive and declaratory relief, Plaintiff seeks an
11 award of attorney’s fees and costs. ECF No. 16 at 6. However, Plaintiff does not
12 claim any specific amount in attorney’s fees and costs, so the Court cannot assess
13 whether the amount is reasonable. *See NewGen, Ltd. Liab. Co. v. Safe Cig, Ltd.*
14 *Liab. Co.*, 840 F.3d 606, 617–18 (9th Cir. 2016) (affirming damages award on
15 default where the plaintiff presented to the district court a “detailed account” of
16 how each requested amount was calculated). The fourth *Eitel* factor disfavors
17 granting Plaintiff a default judgment for unspecified attorney’s fees and costs.

18 Possibility of Dispute Concerning Material Facts

19 The fifth *Eitel* factor is the possibility of a dispute concerning the material
20 facts. *Eitel*, 782 F.2d at 1471–72. None of the Defendants has appeared in this
21 matter to dispute Plaintiff’s allegations, and have therefore admitted the facts

1 alleged in the Complaint. *See TeleVideo Sys.*, 826 F.3d at 917–18. However, as
2 the Court noted above, Plaintiff makes conclusory allegations and minimal factual
3 allegations in support of his claims, without submitting with his Motion for Default
4 Judgment any evidence to corroborate his factual allegations. Therefore, the Court
5 finds that it lacks information to reliably evaluate the possibility that there would
6 be a dispute concerning material facts, and this *Eitel* factor is neutral.

7 Possibility of Excusable Neglect

8 The sixth *Eitel* factor is whether the entry of default was due to excusable
9 neglect. *Eitel*, 782 F.2d at 1471–72. In *Eitel*, the Ninth Circuit found excusable
10 neglect when a party did not answer a complaint because it thought that it had
11 reached a settlement with the plaintiff. *Id.* at 1472. The Court finds no indication
12 of excusable neglect in this matter. Plaintiff personally served Bong Wook Park at
13 his place of business and indicates that he mailed the Motion for Default Judgment
14 to Mr. Park at the same business address. *See* ECF Nos. 3; 16 at 2. Therefore, the
15 sixth *Eitel* factor favors a default judgment.

16 Policy Favoring Decisions on the Merits

17 The seventh *Eitel* factor is the strong policy favoring decisions on the merits
18 in the Federal Rules of Civil Procedure. *Eitel*, 782 F.2d at 1471–72. “Whenever it
19 is reasonably possible, cases should be decided upon their merits.” *Pena v.*
20 *Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). However, a
21 defendant’s failure to appear “makes a decision on the merits impractical, if not

1 impossible.” *PepsiCo*, 238 F. Supp. 2d at 1177. Defendant Bong Wook Park’s
2 failure to appear supports that an adjudication on the merits is unlikely or even
3 impossible in this matter. Therefore, the seventh *Eitel* factor favors default
4 judgment as a case-dispositive option in this matter.

5 Conclusion as to *Eitel* Factors

6 Based on the scant allegations and lack of support offered by Plaintiff, the
7 Court is not satisfied that the *Eitel* factors favor entry of default judgment against
8 Defendant Bong Wook Park. *See Eitel*, 782 F.2d at 1472 (reminding courts that
9 default judgments are usually disfavored). Plaintiff has not fully developed nor
10 supported his arguments for the relief that he seeks. However, as Defendant’s
11 failure to appear in this matter forecloses adjudicating this case on its merits, the
12 Court denies Plaintiff’s Motion for Default Judgment with leave to renew if
13 Plaintiff is able to remedy the deficiencies of the instant Motion.

14 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff’s Motion for
15 Default Judgment, **ECF No. 15**, is **DENIED WITHOUT PREJUDICE**.

16 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
17 Order and provide copies to counsel and Defendant Bong Wook Park at the
18 address where service was completed, *see* ECF No. 3.

19 **DATED** December 15, 2021.

20 s/ Rosanna Malouf Peterson
21 ROSANNA MALOUF PETERSON
Senior United States District Judge